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IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

JOAN G. LOZOYA Plaintiff, v. ERIC J. ANDERSON, M.D.; LINDSEY BLAKE, M.D.; HOSPITAL CORPORATION OF AMERICA INC.; MOUNTAINVIEW HOSPITAL; FREEMONT EMERGENCY SERVICE, INC.; ALEXANDRA M. PAGE, M.D.; KAISER FOUNDATION HEALTH PLAN, INC.; KAISER PERMANENTE and DOES 1 through 30, inclusive Defendants.	CASE NO. 07 CV 2148IEG (WMC) **DEFENDANTS HOSPITAL CORPORATION OF AMERICA AND MOUNTAINVIEW HOSPITAL'S MOTION AND MOTION TO DISMISS PLAINTIFF'S 1st AMENDED COMPLAINT MEMORANDUM OF POINTS AND AUTHORITIES** DATE: June 2, 2008 TIME: 10:30 a.m. DEPT.: Court Room 1 Judge: Irma E. Gonzalez Magistrate: William McCurine, Jr. DATE OF FILING ACTION: 11/08/07

MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

This suit arises out of the 2006 injury allegedly suffered by Plaintiff, Joan Lozoya, as a result of medical care she sought after falling and suffering a fracture to her right shoulder. In addition to HCA and MountainView Hospital, Plaintiff has named as defendants, Eric J. Anderson, M.D., Lindsey Blake, M.D., Freemont Emergency Service, Inc., Alexandra M. Page, M.D., Kaiser Foundation Health Plan, Inc., Kaiser Permanente and certain unidentified nurses and other staff.

MountainView Hospital, Dr. Blake, Dr. Anderson, and Freemont Emergency Service, Inc. are all residents of the State of Nevada. Dr. Page and the Kaiser defendants are residents of California.

Generally, Plaintiff has alleged that on or about November 8, 2006, Joan Lozoya was transported to MountainView Hospital for treatment following a fall in which she injured her shoulder. *See Plaintiff's Complaint at para. 14, attached hereto as Exhibit A.* Plaintiff was seen by Drs. Blake and Anderson, who treated her arm by placing it in a sling and prescribing pain medication prior to discharging her. *Id. at para. 15.* Plaintiff alleges that Defendants, Drs. Blake and Anderson, HCA, and MountainView Hospital failed to request an orthopedic specialist consult prior to transferring her to San Diego. *Id. at para. 16.* On November 11, 2006, Plaintiff was seen in the emergency department of Kaiser Permanente and three days later at the fracture clinic underwent a surgical procedure performed by Alexandra Page, M.D. *Id. at paras. 18-19.* Plaintiff has advanced numerous theories against all defendants, based upon both Federal and State claims. The following Federal claims have been advanced against the HCA, Freemont Emergency Service, Inc. and MountainView Hospital defendants:

1) Violation of 42 U.S.C.A. Sec.1395dd (EMTALA) (*Exhibit A, First Cause of Action, paras. 24-36*).

Additionally, Plaintiff has made the following state law claim against all defendants:

1) Medical Malpractice - Negligence (*Exhibit A, Second Cause of Action, paras. 37-52*).

Additionally, Plaintiff has made the following state law claim against the California Defendants, Alexandra Page, M.D., Kaiser Foundation Health Plan, Inc., Kaiser Permanente, and Does 1 through 30:

1) Medical Malpractice - Negligence (*Exhibit A, Third Cause of Action, paras. 53-63*).

In this Motion, Defendants HCA and MountainView Hospital seek to dismiss all claims against them. As argued below, the Federal claims brought against MountainView Hospital must be dismissed as they fail to state a claim upon which relief may be granted. Further, all the remaining state claims against MountainView Hospital are necessarily premised upon medical negligence. As such, they fall within the purview of NRS 41A.071, which requires a plaintiff to file an affidavit of a medical expert to support any claims of medical negligence. As Plaintiffs have entirely ignored the provisions of this statute, all state claims against MountainView Hospital must be dismissed with prejudice as the 1 year statute of limitations has expired pursuant to NRS 41A.097.

STANDARD FOR MOTION TO DISMISS

"In considering a Motion to Dismiss, the factual allegations of a complaint must be presumed to be true, and this Court must draw all reasonable inferences in favor of the plaintiff." *In re Stratosphere Corp. Sec. Litig.*, 1 F.Supp.2d 1096, 1103 (D. Nev.1998) (citation omitted). "The Court does not, however, necessarily assume the truth of legal conclusions merely because they are cast in the form of factual allegations in the complaint." *Id.* (citations omitted). Further, conclusory allegations of law are insufficient to defeat a 12(b)(6) motion to dismiss. *Epstein v Washington Energy Co.*, 83 F.3d 1136, 1140 (9th Cir. 1996).

ARGUMENT

1. Plaintiff has failed to plead the prima facie elements of 42 U.S.C.A. Sec. 1395(dd).

a. A hospital does not violate EMTALA if it fails to detect or if it misdiagnoses an emergency condition

The First Cause of Action of Plaintiff's Complaint alleges violation of 42 U.S.C.A.Sec.1395(dd) also known as the Emergency Medicine Treatment and Labor Act ("EMTALA"). Congress promulgated EMTALA because it was "concerned that hospitals were 'dumping' patients who were unable to pay, by either refusing to provide emergency medical treatment or transferring patients before their conditions were stabilized." *Eberhardt v City of Los Angeles*, 62 F.3d 1253, 1255 (9th Cir. 1995).

If an individual seeks emergency care from a hospital within an emergency room and if that hospital participates in the Medicare program, then "the hospital must provide for an appropriate medical screening examination within the capability of the hospital's emergency department…to determine whether or not an emergency medical condition…exists." 42 U.S.C. § 1395dd(a); *Eberhardt*, 62 f.3d at 1255-56. If the hospital's medical staff determines that there is an emergency condition, then, except under certain circumstances not relevant here, the staff must "stabilize" the patient before transferring or discharging the patient. 42 U.S.C. § 1395dd(b)(1); *Baker v. Adventist Health, Inc.*, 260 f.3d 987, 992 (9th Cir. 2001). The term to "stabilize" means "to provide such medical treatment as may be necessary to assure, within reasonable medical probability, that no material deterioration of the condition is likely to result from or occur during the transfer of the individual from the facility. 42 U.S.C. § 1395dd(e)(3)(A). Transfer includes both discharge and movement to another facility. *Id.* § 1395dd(e)(4).

Plaintiff, in her Complaint, states that she was seen at MountainView Hospital by Drs. Blake and Anderson. After reviewing her condition, it was their medical opinion that Plaintiff's arm needed to be placed in a sling and that pain medication needed to be prescribed prior to being discharged. Plaintiff has not made any allegations that she was treated inappropriately because she was part of the class EMTALA was enacted to protect. As previously stated, Congress passed the Act commonly referred to as the "Anti-dumping Act," to protect the underinsured individuals that a hospital may in the past have been inclined to refuse treatment to. In fact, Plaintiff was seen by two physicians in addition to the MountainView Hospital emergency department staff prior to being discharged. Plaintiff was treated as any other patient coming into the ER with a broken bone would have been. Plaintiff is attempting to use the EMTALA Act to assert her claims of medical malpractice in Federal Court.

EMTALA, however, was not enacted to establish a federal medical malpractice cause of action nor to establish a national standard of care. Section 1395dd(a) is not designed to redress a negligent diagnosis by the hospital. Thus the Court has held that a hospital has a duty to stabilize only those emergency medical conditions that its staff detects. *Jackson*, 246 F.3d at 1254-55. An individual who receives substandard medical care may pursue medical malpractice remedies under state law. *Eberhardt*, 62 F.3d at 1258.

If it is Plaintiff's contention that she received substandard care while being treated for her fracture in the MountainView Hospital emergency department, she may pursue medical malpractice remedies under state law as the Court held in *Eberhardt.*

2. Because Plaintiff failed to state a claim under any of the federal statutes identified in her Complaint, the Court should dismiss this action for lack of subject matter jurisdiction.

Plaintiff, Dr. Page, and the Kaiser defendants are all residents of the State of California. Accordingly, this Court does not have diversity jurisdiction over this action. *See* 28 U.S.C. Sec. 1332. Moreover, because Plaintiffs have failed to state a claim for violation of any federal statutes identified in her Complaint, this Court should dismiss the pendent state law claims for lack of jurisdiction as there exists no federal question and the parties are not diverse.

3. Should the Court decide to exercise jurisdiction over the pendent state law claims, the Court should dismiss the Nevada parties because Plaintiff has failed to state a cognizable claim for medical malpractice.

a. Plaintiff's claim of medical negligence must be dismissed for failure to attach the affidavit of a medical care provider pursuant to NRS 41A.071.

The Second Cause of Action in Plaintiff's Complaint advances a state law claim based upon medical malpractice. It is a well settled principle of Nevada law that expert medical testimony is the legal standard required to prove medical negligence. *Fernandez v. Admirand*, 108 Nev. 963, 843 P.2d 354 (1992). Indeed, by statute, "(l)iability for personal injury or death is not imposed upon any provider of medical care based on alleged negligence in the performance of that care unless evidence consisting of expert medical testimony, material from recognized medical texts or treatises or the regulations of the licensed medical facility wherein the alleged negligence occurred is presented." NRS 41A.100. Moreover, experts testifying pursuant to this section, "may only be given by a provider of medical care who practices or has practiced in an area that is substantially similar to the type of practice engaged in at the time of the alleged negligence." *NRS 41A.100(2)*. Although there are certain limited exceptions to the requirements of this section, NRS *41A.100(1)(a)-(e),* none of these are applicable to the instant case.

Further, pursuant to NRS 41A.071:

> If an action for medical malpractice or dental malpractice is filed in the district court, **the district court shall dismiss the action, without prejudice, if the action is filed without an affidavit, supporting the allegations contained in the action**, submitted by a medical expert who practices or has practiced in an area that is substantially similar to the type of practice engaged in at the time of the alleged malpractice. NRS 41A.071. (Emphasis added).

The necessary medical affidavit is absent from Plaintiff's Complaint.

The Nevada Supreme Court addressed the dismissal requirements of NRS 41A.071 in Washoe Med. Ctr. v. Second Jud. Dist. Ct., 122 Nev. Adv. Rep. 110, 148 P.3d 790 (2006). The Washoe case was a medical negligence action brought against Washoe Medical Center and a surgeon for injuries sustained during a surgical procedure. Washoe Med. Ctr., at 791. As in this case, Plaintiff failed to attach a medical expert affidavit as required by NRS 41A.071. Id. In response, defendant, Washoe Medical Center, filed a motion to dismiss Plaintiff's Complaint. Id. Immediately following this filing, Plaintiff amended the Complaint to include a medical expert affidavit and filed an opposition to the motion to dismiss. Id. at 791-792. Washoe Medical Center's subsequent motion to strike the Amended Complaint was denied by the District Court forcing Washoe Medical Center to petition the Supreme Court for a writ of mandamus directing the district court to dismiss Plaintiff's original Complaint and to strike the amended Complaint. Id. at 792. The petition was granted and held as follows:

> We conclude that a medical malpractice complaint filed without a supporting medical expert affidavit is void ab initio, meaning it is of no force and effect. **Because a complaint that does not comply with NRS 41A.071 is void ab initio, it does not legally exist and thus cannot be amended.** Therefore, NRCP 15(a)'s amendment provisions, whether allowing amendment as a matter of course or leave to amend, are inapplicable. **A complaint that does not comply with NRS 41A.071 is void and must be dismissed; no amendment is permitted.**

Plaintiff has failed to attach the required medical expert affidavit in this case. Therefore, in keeping with the ruling in *Washoe*, the complaint is void ab initio and does not legally exist. Dismissal is required in this case as there is no legal document to amend.

It is a well settled principle of Nevada jurisprudence that in order to give effect to the Legislature's intent, the court seeks to look at the plain language of a statute. *Salas v. Allstate Rent-A-Car, Inc.*, 116 Nev. 1165, 1168. NRS 41A.071 was part of Assembly Bill 3 enacted by the Special Session of the Nevada Legislature in July of 2002 to remedy medical malpractice litigation in the State. As defined by the legislature, part of the intent of this Act was "providing for the mandatory dismissal of an action for medical malpractice or dental malpractice under certain circumstances." *Nev. 18th ss, c.3, Approved August 7, 2002*. NRS 41A.071 clearly addresses this Legislative intent as by its language ("the district court **shall dismiss**") it provides for mandatory dismissal of medical malpractice claims which do not meet its requirements.

As Plaintiff has failed to file the required medical affidavit to support the allegations of medical negligence, the second cause of action must be dismissed.

b. Plaintiff has failed to file a timely complaint pursuant to 41A.097

Pursuant to NRS 41A.097:

> Except as otherwise provided in subsection 3, an action for injury or death against a provider of health care may not be commenced more than 3 years after the date of injury or **1 year** after the Plaintiff discovers or through the use of reasonable diligence should have discovered the injury, whichever occurs first, for:

c. Injury to or the wrongful death of a person occurring on or after October 1, 2002, from error or omission in practice by the provider of health care.

The leading case in Nevada interpreting this statute and the applicable discovery rule identifies the central issues to address in the instant motion. Massey v. Litton, 99 Nev. 723 (1983). There, the Court cites with approval the general principles established by other jurisdictions regarding the meaning and practical effect of the discovery rule. Specifically, the court noted:

> This rule has been clarified to mean the statute of limitations begins to run when the patient has before him facts which would put a reasonable person on ***inquiry notice*** of his ***possible*** cause of action, ***whether or not it has occurred to the particular patient to seek further medical advice***. Id. at 727-28 (internal citations omitted).

The standard established by the Court in Massey is not an onerous one. Instead, the statute of limitations as modified by the discovery rule begins to run when the putative plaintiff has ***inquiry*** notice of a ***possible*** cause of action. The Court there further went on to note that such inquiry notice of a possible cause of action does not require the patient to seek different medical advice because in the Massey case, the plaintiff's physician advised her during follow up care that the symptoms she experienced were common postoperative complaints. Id. at 728.

Plaintiff was allegedly injured on or about November 8, 2006, and made some reference to realizing that she was harmed by or about April 4, 2007. Under the plain meaning of the Supreme Court's opinion in Massey v. Litton, 99 Nev. 723 (1983), and based upon the pleadings contained within Plaintiff's Complaint, the statute of limitations ran on or about April 4, 2008. Plaintiff's complaint as it stands without a medical expert affidavit, does not legally exist and is void ab inito. In addition, Plaintiff has failed to remedy the situation within the statute of limitations by refilling the complaint with the statutorily required medical expert affidavit. Therefore, defendants

MountainView and HCA respectfully request that they be dismissed with prejudice from this action in accordance with the rulings in *Massey* and *Washoe* cited above.

DATED this ___ day of April, 2008.

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